

penalty. (See Ruling Granting Defendant's Motion for Judgment of Acquittal dated November 19, 2003 ("Rule 29 Ruling").)

Despite this favorable outcome, Jones had repeatedly expressed throughout the trial dissatisfaction with his court-appointed attorneys' performance and their trial strategy. In addition, he had moved for the appointment of new counsel, contending that he had received ineffective assistance of counsel due to a conflict of interest between him and his attorneys. The court denied all such motions and made contemporaneous oral findings from the bench.

In this ruling, the court supplements its previous oral rulings on Jones's motions to substitute counsel as well as his claim that he received ineffective assistance of counsel due to a conflict of interest between him and his attorneys.

BACKGROUND

In the Fifth and Sixth Superseding Indictments (the "Indictments"), the government charged Jones with violations of RICO, RICO conspiracy, the VICAR murders of Lawrence and Scott, VICAR conspiracy to commit murder, narcotics trafficking, and firearms offenses related to the VICAR

murders. On August 22, 2002, the government filed an amended notice of intent to seek a sentence of death ("Amended Notice") based on Jones's role in the VICAR murders of Scott and Lawrence. The Amended Notice provided that if the jury returned a guilty verdict on either or both of the VICAR murders, Jones would be eligible for the death penalty. Conversely, acquittals on both VICAR murder counts would obviate the need for a death-penalty sentencing phase.

Two experienced criminal defense attorneys, Robert Casale and Charles Tiernan, defended Jones against the charges brought in these Indictments. On November 7, 2000, Attorney Tiernan appeared as Jones's retained counsel and was later appointed by the court under the Criminal Justice Act to continue serving as counsel. On May 30, 2001, the court appointed Attorney Casale to serve as co-counsel because of his substantial experience defending death-penalty prosecutions.

FACTS

Based on the record and its own contemporaneous observations during jury selection and trial, the court makes the following findings of fact:

On July 28, 2003, Jones, his attorneys, and the government appeared before the court to consider several motions filed by Jones's attorneys. At that hearing, the court set October 7, 2003, as the first day of jury selection.

In August 2003, the Clerk mailed a summons and a fourteen-page questionnaire to 500 potential jurors, with instructions to complete and return the questionnaires promptly. On September 4, 2003, the court and counsel met to discuss the responses to the questionnaires. Based on this review, the court determined that additional jurors were needed to ensure an impartial jury and ordered the Clerk to send a summons and questionnaire to an additional 300 potential jurors. On September 30, 2003, the court and counsel met again to discuss the results from this second set of questionnaires.

On or about October 3, 2003 (Friday), the court received a letter from Jones dated September 25, 2003, in which he indicated for the first time that he was dissatisfied with his counsel. (See Letter from Luke Jones dated September 25, 2003, at Exhibit A.) More specifically, he stated that an "irreconcilable conflict of interest" existed between him and his attorneys. (Exhibit A at 1.) Consequently, before jury

selection began on October 7, 2003 (Tuesday), the court asked Jones in open court to explain why he was dissatisfied with Attorneys Casale and Tiernan. Jones stated, among other things, that he and his attorneys disagreed about trial strategy, and that they had not made adequate visits to see him where he was incarcerated to discuss the case. Accordingly, Jones claimed that Attorneys Casale and Tiernan were rendering him ineffective assistance of counsel, and moved for a continuance and the appointment of new counsel. The court denied these motions from the bench.

Trial commenced on October 10, 2003. As the trial progressed, the court observed that Attorneys Casale and Tiernan had adopted a trial strategy designed to shield Jones from the death penalty by seeking acquittals on the two VICAR murders. In pursuing this strategy, Jones's counsel made the calculated decision - in the face of the government's overwhelming evidence showing that he led a narcotics-trafficking organization in the P.T. Barnum housing project ("P.T. Barnum") - to concede Jones's role in the drug gang. Instead, Jones's attorneys focused their attention on the government's evidence regarding his role in the alleged VICAR murders. For example, Attorneys Casale and Tiernan exposed inconsistencies in the testimony of the government's two

eyewitnesses to the Scott VICAR murder, Ricky Irby and Markey Thergood. With respect to the Lawrence VICAR murder, Jones's counsel elicited key admissions from the government's witnesses revealing that although Jones may have fatally shot Lawrence, his motive for doing so was not to "maintain or increase" his position in the drug enterprise as required by 18 U.S.C. § 1959(a) and controlling Second Circuit case law.

On October 30, 2003, the jury returned guilty verdicts on all counts except the Scott VICAR murder and the related firearms offense. On November 3, 2003, after hearing extensive argument from counsel, the court granted Jones's motion for acquittal with respect to the verdicts on the Lawrence VICAR murder and the related firearms offense. Consequently, because Jones was acquitted of the two VICAR murders, he was no longer death-eligible and subject to the sentencing phase of the FDPA. In short, Jones's counsel had succeeded in shielding him from the death penalty.

During the course of the trial, Jones regularly stated on the record his objections to his defense counsel's trial strategy, his dissatisfaction with their performance, and his view that he was being rendered ineffective assistance of counsel. For example, Jones protested that Attorneys Casale and Tiernan, against his explicit instructions, had failed to

call individuals to testify that Jones had identified as defense witnesses. (Trial Transcript ("Tr.") at 2434-35.) Jones also claimed that his attorneys had prevented him from testifying on his own behalf. (Tr. at 2966.)

In addition, Jones was not shy about expressing his displeasure with his counsel, even in the presence of the jury. On the first day of trial, Jones angrily interrupted Attorney Casale's opening statement, which led to this colloquy in front of the jury:

MR. CASALE [delivering opening statement to the jury]: . . . I think in your belly you're going to say to yourself, "he's responsible for [murdering Lawrence]," but in your mind, your analytical mind, you're going to say, "But it's not a VICAR homicide, it's not a charge" -

MR. JONES: Your Honor, this is - this got to stop right here.

THE COURT: Mr. Jones -

MR. JONES: Your Honor, I done told [Attorney Casale], I done told [my attorneys] I'm not 'fessing to these murders. He's talking to the jury like I committed these murders, you understand? I don't care if a million people come in here and say I kill these people, I'm not 'fessing to that. I told you attorneys time and time again, and this is what I was stressing to you.

. . .

This is bullshit right here. [Attorney Casale] just convicted me, he just tell these people I kill the people. I don't get a fair trial. I told you, I stressed to you, we're not going to argue that. I stressed to you we're not going to argue that.

(Tr. at 44.)

The court immediately excused the jury. After the jury left the courtroom, Jones continued to berate Attorney Casale in open court:

MR. JONES: You've given these witnesses credibility to smash me out.

MR. CASALE: You're wrong.

MR. JONES: I'm not wrong. . . . [Y]ou didn't tell me you are going to say that in an open argument [sic]. You asked me a couple questions about a few witnesses, that's what you asked me. You never told me, and I stressed to both of you all that I would not have you going in this courtroom and argue that I killed these people.

MR. CASALE: I didn't say that.

(Tr. at 45.) When court resumed after Jones's outburst, he directed his counsel to move for a mistrial. The court denied the motion. (Tr. 46-47.)

On the fourth day of trial (October 16, 2003), Jones appeared in the morning dressed in prison garb, and asked that the trial proceed without his presence because his lawyers were ineffective. (Tr. at 989.) The court denied Jones's request and ordered that he remain present in the courtroom for the entire trial; Jones agreed to change into his dress clothes and remained without further incident. (Tr. at 991.)

Despite his frequent claims of dissatisfaction with Attorneys Casale and Tiernan, the court observed Jones

communicating regularly with them in whispered conversations at the defense table from the first day of jury selection to the last day of trial. In fact, after the October 16th incident in which Jones asked that the trial proceed with him in absentia, the court began keeping a log at the bench that memorialized each in-court communication between Jones and his counsel for the remainder of the trial. This log noted the starting time of Jones's conversation with his attorneys, the ending time of the communication, the parties to the communication (i.e., Jones and Attorney Casale and/or Attorney Tiernan), and the name of the witness testifying at the time the communication was initiated. This log is attached to this ruling as Exhibit B.

DISCUSSION

At the beginning of jury selection and during trial, Jones made oral motions for the appointment of substitute counsel to replace Attorneys Casale and Tiernan. The court denied these motions from the bench and further sets forth its reasoning below.

I. Motion to Substitute Counsel

A. Standard

The Second Circuit employs a four-factor test in determining whether a motion to substitute counsel is warranted: (1) whether the defendant made a timely motion requesting new counsel; (2) whether the trial court adequately inquired into the matter; (3) whether the conflict between the defendant and his attorney was so great that it resulted in a "total lack of communication preventing an adequate defense"; and (4) "whether the defendant substantially and unjustifiably contributed to the breakdown in communication [between himself and his attorneys]." See United States v. John Doe #1, 272 F.3d 116, 122-23 (2d Cir. 2001), 537 U.S. 851 (2002). In evaluating whether the fourth factor has been met, the court should consider whether "a defendant's own conduct contribut[ed] to the communication breakdown." Id. at 123 (emphasis added).

B. Analysis

The court finds that Jones cannot satisfy any of the four factors outlined in John Doe #1. First, Jones failed to make a timely motion requesting new counsel. Attorneys Tiernan and Casale began representing Jones on November 7, 2000, and May 30, 2001, respectively. On August 22, 2002, the government

filed its Amended Notice seeking the death penalty. On July 28, 2003, the court set October 7, 2003 (Tuesday), as the first day of jury selection.

The court, however, first heard of Jones's dissatisfaction with his lawyers on the Friday (October 3, 2003) before jury selection was scheduled to begin on the following Tuesday. Simply put, Jones's motion for new counsel was extremely untimely: It was effectively filed more than two years after Attorneys Tiernan and Casale had begun representing Jones, more than one year after the government filed its Amended Notice, and more than two months after the court set the schedule for jury selection and trial. In fact, by the time the court received Jones's letter, the court and counsel had already prepared for jury selection by reviewing completed questionnaires from an original pool of 800 potential jurors.

Second, even though Jones's motion for new counsel was untimely, the court made a detailed inquiry of him on the record about why he had become dissatisfied with his attorneys. During this colloquy, which took place before jury selection, Jones indicated that he was dissatisfied with, among other things, the level and quality of his attorneys' communication with him as well as the frequency of their

visits to his place of incarceration in Pennsylvania and later on in Rhode Island. In response, the court informed Jones that Attorneys Casale and Tiernan were extremely competent criminal defense lawyers, and that trial preparation required them to complete many time-consuming tasks, including court appearances and the review of juror questionnaires, which limited how often they could visit him to discuss the case. Based on this inquiry, the court finds that their attorney-client relationship did not constitute a "total lack of communication preventing an adequate defense." John Doe #1, 272 F.3d at 122.

In addition, Jones's frequent communications with his lawyers during jury selection and trial, which are memorialized in Exhibit B, further undercut his contention that there was poor communication between him and his lawyers. The court's log indicates that on certain days of trial, such as October 21 and 23, 2003, Jones communicated with his lawyers on more than thirty occasions. (See Exhibit B.)

Finally, even if the court were to indulge Jones's unsupported claim that a total breakdown in communication existed between him and his counsel, the court finds that Jones's conduct was the primary reason for this breakdown. From the court's perspective, Jones's self-serving efforts to

create a factual record that might support a future claim for ineffective assistance of counsel needlessly antagonized Attorneys Casale and Tiernan, and interfered with their diligent efforts to defend his interests. As the court remarked on the first day of trial, Jones had no reasonable justification for his angry outburst during Attorney Casale's opening statement. (Tr. at 45-46.) Similarly, Jones's contrived request that the trial proceed without his presence furthered no legitimate objective and only strained his relationship with his attorneys. (Tr. at 989-91.)

In sum, the court finds that Jones has failed to satisfy any of the four factors outlined in John Doe #1. Accordingly, the court denies his untimely motion to substitute counsel.

II. Claim of Ineffective Assistance of Counsel Based on Alleged Conflict of Interest

Jones also repeatedly contended during trial that he was receiving ineffective assistance of counsel because there was a conflict of interest between him and Attorneys Casale and Tiernan. This claim is also without merit.

A. Standard

The right to counsel under the Sixth Amendment "includes a right to conflict-free representation." Armienti v. United States, 234 F.3d 820, 823 (2d Cir. 2000). The Second Circuit recognizes three types of conflicts of interest when evaluating Sixth Amendment claims based on an allegation of ineffective assistance of counsel: (1) a per se conflict requiring automatic reversal without a showing of prejudice; (2) an actual conflict of interest that carries a presumption of prejudice; and (3) a potential conflict of interest that requires a finding of both deficient performance by counsel and prejudice pursuant to the standard established in Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See Armienti, 234 F.3d at 823-24.

Based on this record, the court can find no facts that would support a finding of a per se or an actual conflict of interest. The Second Circuit has found per se conflicts in two limited circumstances: (1) where trial counsel is not authorized to practice law, or (2) where counsel is implicated in the crime for which the defendant is on trial. See Armienti, 234 F.3d at 823. Plainly, neither circumstance is present here.

Next, an actual conflict occurs "when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." Armienti, 234 F.3d at 824 (citations and internal quotation marks omitted). This claim also fails because a defendant such as Jones cannot establish an actual conflict of interest simply by expressing dissatisfaction with his attorney's performance or strategy. See John Doe #1, 272 F.3d at 126; see also United States v. Moree, 220 F.3d 65, 71 (2d Cir. 2000) (internal quotation omitted).

Finally, despite Jones's best efforts to show otherwise, the court finds that there was no potential conflict of interest between him and his attorneys that rendered their representation of him ineffective under the Sixth Amendment. To support this type of potential conflict of interest, Jones must establish under the Strickland standard that his attorneys' conduct fell below an objective standard of reasonableness and that but for their deficient performance, the result of the trial would have been different. Strickland, 466 U.S. at 688.

As the court recognized on the record during trial, however, Attorneys Casale and Tiernan are experienced,

competent attorneys who provided an excellent defense for Jones, particularly under difficult circumstances caused by his obstreperous conduct. The court further finds that their success in securing acquittals on the two death-eligible VICAR murder counts - thereby sparing him from the death penalty - fatally undermines any possible claim of prejudice.¹ As a result, the court finds that based on the trial record, Jones cannot satisfy either prong of the Strickland standard, thus precluding any finding that a potential conflict of interest existed between him and his attorneys.

SO ORDERED this _____ day of January, 2004, at Bridgeport, Connecticut.

Alan H. Nevas
United States District Judge

¹ The court is unaware of any authority in which capital defense counsel have been found to be ineffective after obtaining acquittals on all death-eligible charges brought in a death-penalty prosecution. To the extent Jones believes that his lawyers were ineffective because they did not obtain acquittals on the non-VICAR-murder charges contained in the Indictments, such a contention would be meritless and would ignore the government's overwhelming evidence corroborating his role as the leader of the drug enterprise in P.T. Barnum.

EXHIBIT A

EXHIBIT B